SHERIFF APPEAL COURT

[2018] SAC (Crim) 10
SAC/2018-000006/AP

Sheriff Principal I R Abercrombie QC
Sheriff S Murphy QC
Sheriff W H Holligan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL I R ABERCROMBIE QC

in

APPEAL AGAINST CONVICTION BY WAY OF STATED CASE

by

DOUGLAS McCONACHIE

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondent

Appellant: Mackintosh; Faculty Services Limited
Respondent: J Farquharson, AD; Crown Agent

14 August 2018

[1] Douglas McConachie appeals against his conviction for breach of the peace at Aberdeen Sheriff Court in October 2017. He was originally charged under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 but at the conclusion of the Crown case the procurator fiscal depute properly conceded that there was insufficient evidence for the statutory charge to prove. The defence submitted that there was no case to answer in

respect of the common law alternative of breach of the peace. The summary sheriff repelled that submission and proceeded to convict.

[2] The summary sheriff found that the complainer, a boy aged twelve, was going home after school on a bus. He became aware that the appellant, a 65 year old man who was a passenger on the bus, was intermittently smiling and winking at him. The Appellant wrote his name, address and phone number on the back of his bus ticket, and as he was alighting from the bus he placed the ticket on top of the complainer's gym bag, which was on his lap. Another passenger saw this and also observed the appellant making a gesture towards the complainer after he had got off the bus suggesting that the complainer phone him. The complainer continued on his journey home feeling "stressed and uncomfortable". The other witness thought "it didn't seem right" and "it seemed off" because it did not look as if the appellant and the complainer knew each other.

[3] There was no defence evidence. Having repelled the submission of no case to answer, the summary sheriff heard further legal submissions and proceeded to convict. He considered that the complainer had been alarmed by the appellant's behaviour, in public, and that the conduct had been severe enough to cause alarm to ordinary people and to threaten serious disturbance to the community.

[4] In repelling the submission of no case to answer the summary sheriff had regard to the test set out in the leading modern case on the subject of breach of the peace, *Smith* v *Donnelly* 2002 JC 65. He further considered that the case of *Bowes* v *Frame* 2010 JC 297 supported the Crown position.

[5] Before this court Mr Mackintosh accepted that the sheriff had been correct to apply the test in *Smith* v *Donnelly.* However, he had erred otherwise. *Bowes* v *Frame* fell to be distinguished on a number of grounds. In that case a taxi driver had repeatedly made

sexually suggestive remarks to a girl aged 14 whom he was driving to school. The conduct had taken place in private but had been much more serious than in the present case and was of such a nature as to be genuinely alarming and to threaten serious disturbance to the community. In the present case nothing had been said, the appellant and the complainer had at all times been in full public view and there had been no contact between them beyond the placing of the ticket onto the top of the complainer's bag. The case of *Angus v Nisbet* 2011 JC 69 had not been placed before the sheriff. There the appellant had repeatedly approached a teenage newspaper delivery girl in a public street and had passed her a piece of paper with a message and his mobile telephone number on it, asking her to keep in touch with him. The High Court of Justiciary held that the conduct complained of was not such as to cause alarm to ordinary people and threaten serious disturbance to the community and the appeal was successful. It could be said that the behaviour complained of in that case was more serious than in the present case because the girl had been approached more than once and the accused had actually spoken to her. In *Burnett* v *PF Hamilton* [2017] SAC (Crim) 4 the appellant had repeatedly approached a young girl and engaged her in conversation; on the last occasion he had invited her to come to his house. In that case a conviction in terms of section 38(1) of the 2010 Act had been upheld. The court emphasised that each case was fact-specific and had considered *Angus* v *Nisbet* before deciding that the circumstances in *Burnett* were significantly more serious.

[6] The learned advocate depute replied that the sheriff had been correct to conclude that the circumstances here met the test in *Smith* v *Donnelly*. The response of the witness, who had observed only the passing of the ticket and the gesture made by the appellant after he had alighted from the bus, was one of justifiable indignation and concern over where the conduct might lead. In *Angus* v *Nisbet* everything had happened in a public place and while

the behaviour was odd it had not caused concern. In the present case there had been flagrantly suggestive behaviour directed at the complainer during the journey by smiling, winking, passing the annotated ticket and gesturing afterwards. The appellant had been wearing his sports shorts and a bystander's attention had been drawn by the appellant's conduct. The circumstances were readily distinguishable from *Angus* v *Nisbet* but clearly met the test contained in paragraph 17 of *Smith* v *Donnelly*. Accordingly the sheriff had not erred.

Discussion and Decision

[7] The appropriate test is to be found in the Opinion of the High Court delivered by Lord Coulsfield in *Smith* v *Donnelly*. At para 17 his Lordship said, under reference to *Ferguson* v *Carnochan* 1889 16R (J) 93,

> "… it is, in our view, clear that what is required to constitute the crime is conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community."

The paragraph concludes with this passage:

> "What is required, therefore, it seems to us, is conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person."

This test was applied in both *Bowes* v *Frame* and *Angus* v *Nisbet*, with differing results according to the particular circumstances of each of those cases. More recently it was applied in *Wotherspoon* v *PF Glasgow* [2017] HCJAC 69 where the Lord Justice General, at para [22], indicated that it was a relatively high test by stressing that what was required was conduct causing *alarm* and threatening *serious* disturbance to the community. As he stated conduct "... which does present as genuinely alarming *and* disturbing, in its context, to *any* reasonable person". In that case, as in *Angus* v *Nisbet*, the High Court decided that in the

particular circumstances of the case the conduct complained of, which might well be considered unusual or odd, was not sufficiently serious or alarming and did not threaten serious disturbance to the community to constitute the crime of breach of the peace.

[8] We consider that what occurred in the case of *Bowes* v *Frame* was considerably more serious than in the present case because the appellant in that case had started a conversation over sexual matters in private with a young girl who was in his care as a passenger in his taxi. Similarly in *Burnett* v *PF Hamilton* the appellant had sought to entice the complainer, a young girl whom he did not know, from a public place to a private one with an implication which both the sheriff and the appellate court drew that sexual impropriety might follow.

[9] In our view the circumstances of the present case are much closer to those in *Angus* v *Nisbet.* Everything which occurred took place in public view. The appellant did not seek to engage in any conversation with the complainer. No physical contact took place beyond the placing of the ticket on top of the bag which was on the complainer's lap. The final gesture was made after the appellant had alighted from the bus. There was nothing threatening about the appellant's conduct at any stage. While the complainer was "stressed" and "uncomfortable" over what had happened, and that is understandable, the adult witness who observed a part of the encounter thought it "did not seem right" and "seemed off". In these circumstances we cannot agree with the summary sheriff that the conduct meets the test of being genuinely alarming and disturbing to any reasonable person and that it was likely to threaten serious disturbance to the community. The appellant's behaviour can be considered inappropriate and imprudent conduct towards a child whom he did not know but we respectfully agree with the observation made by the High Court at paragraph 15 in the case of *Angus v Nisbet* that not all such behaviour is made criminal by reference to the law of breach of the peace.

[10] Accordingly we shall answer the question in the negative and sustain the appeal.